



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO 1400 OF 2012

(Before: D.K.N.Marete)

JOSEPH ALEPER.....1ST CLAIMANT

TIMOTHY EKIDOR2ND CLAIMANT

Versus

LODWAR WATER AND SANITATION

COMPANY LIMITED.....RESPONDENT

RULING

In the course of proceeding in this matter on 17th June, 2013, an issue arose from counsel for the claimant regarding violation of a consent order regarding non termination of the claimant's employment. She submitted that their salaries had now been stopped despite the consent order and sought directions of court on the subject.

At the mention, A Mr. Obure, who appeared and held brief for Miss Sinkiyan for the respondent submitted that his instructions were indeed limited and that a matter of such magnitude should involve counsel for the respondent. It was agreed that the matter be further mentioned on 20th June, 2013 with a view to thrashing the issue in the presence of the counsel.

On 20th June, 2013, the matter came to court for mention whereby a Mr. Kuyoni appeared for the respondent with Mrs Arwa for the claimants. The respondent submitted and argued that the intent of the court orders of 17th September, 2013 and reinforced by the orders of 24th September, 2013 was that the claimants should continue receiving their pay during the pendency of their contract of service and no more.

The contract for the 1st claimant expired on 7th April, 2013 whereas that of the 2nd claimant expires in December, 2013. The claimants' option, in the event of non-compliance with the consent orders of court is to file an application for contempt of court.

At this juncture, the court ordered the parties to file written submissions enlisting their various positions on the subject and that there be a mention on 4th July, 2013 at 900 hours to confirm compliance. On the date of this mention, there was no appearance by counsel for the respondent. The applicants however were in full compliance and therefore a further mention on 15th July, 2013 was prayed for and ordered by court. On this date compliance was had and therefore this ruling.

The ruling as earlier cited arises out of a complaint by the claimants that the respondent has disobeyed the

consent order dated 19th September, 2012 which partly provides as follows;

1. **THAT** an order of injunction is granted against the Respondent whether by themselves, agents and or servants whosoever otherwise from recruiting a general manager and commercial/administration manager or replacing the applicants in any manner whatsoever pending the hearing and determination of this suit.
2. **THAT** an order of injunction is granted against the Respondents restraining them whether by themselves, agents and or servants or however otherwise from terminating the services of the applicant, pending the hearing and determination of this suit.
3. **THAT** the application dated 13th September, 2012 be mentioned on 24th September, 2012 to confirm whether the applicants have received their August 2012 salaries and benefits that accrue to them as employees of the Respondent for the month of August, 2012.

Indeed, the record of court indicates that the date of the order is 17th September, 2012 and not 19th as cited.

The claimants submit that the respondent has stopped the 1st claimant's salary from 7th April, 2013 and also not fully paid the 2nd claimant's leave allowance, a balance of Ksh.20,775.00 of which is claimed.

The claimants contend that the respondents entered into this consent barring them from interfering with the employment contract of the claimants dated 10th April, 2010 with regard to its expiry.

5. "Your Lordship, it is important to note that the Respondent consented to the order of 19th September, 2012 which in effect barred them from interfering with the employment status of the claimants. The Respondent has not sought to vary the said order which in effect varied the terms of the employment contract of the 1st Claimant dated 10th April, 2010 with regard to its expiry. The said consent order while construed had the effect of conferring on the Claimants their privileges under their respective contracts which include, but is not limited to, paying their salaries till this matter is dispensed with. However in flagrant breach of the court order, the Respondent has stopped payment of the 1st Claimant's salaries without any justification. The Respondent has not paid salaries for the months of April and May 2013. A consent order when ordered has a contractual effect. It can never be varied when it was entered into without any dint of fraud, mistake or misrepresentation. A consent order acts as an estoppels and no party is allowed to go against it."

The claimants further submit that the respondents are in breach of outright court orders and should be held to be in contempt. This breach makes the claimants victims of obeying the law.

The respondents refute the complaint and deny being in breach of the court order. The position of the respondent on the matter is;

- a. The Court Order of 19/9/2012 required the Respondent **not to terminate** the Claimants' services, and **not to replace them** with a general manager and commercial/administration manager.
- b. The Respondent has complied fully with the order.
- c. The Respondent has not terminated the claimant's services.
- d. 1st claimant's 2 year-contract **expired automatically on 7/4/2013** and thus the Respondent is no longer obligated to continue paying him as he is no longer its employee.
- e. The 2nd Claimant is still being paid his dues since the contract he allegedly has, is to expire on **31st December, 2013**.
- f. There is no basis for 1st Claimant to expect to be paid any salary beyond the contract period, while in the suit he is only asking for payment of salary up to 7th April, 2013;
- g. The 1st Claimant's contract had lawfully ended, and the court has no power to extend it. There was no termination under Section 35 of the Employment Act, 2007;
- h. That if the Claimants believed the Respondent was in breach of the Court Order, they should move the Court of a proper application that the Respondents can respond to;

- i. *The Court had no power to give any substantive ruling on the issue on a mention date and as such the oral complaints and the subsequent mentioned was a waste of time.*

Besides, the respondents submit that the procedure adopted by court is unknown in law;

Procedure adopted unknown in law:

8.1 *From the outset the Respondent opposed and is still opposed to the procedure adopted in this matter in addressing the Claimant's allegations that the Respondent is in breach of aforesaid court order.*

8.2 *The Claimants ought to have moved the Court on a proper application to which the Respondent would have responded to and the court would have made a determination.*

8.3 *We rely on **Rule 16 of the Industrial Court (Procedure) Rules, 2010.***

8.4 *In fact the Orders said to have been breached, were issued when the court was seized of an interlocutory application: the Claimant's Notice of Motion dated 15th August 2012. There is no basis for adopting the procedure adopted herein and without the Respondent's consent.*

8.5 *We submit that filing of submissions by the Claimants cannot in any way be equated to or dispense with the requirement to file an application upon which the court can make a determination.*

8.6 *Submissions can only address issues of law or allow the parties to sum up their cases after facts and issues for determination have been interrogated against evidence proffered. We rely on **Rules 26 and 27(1)(c) the Industrial Court (Procedure) Rules, 2010.***

8.7 *It would in law be incompetent for the court to make a ruling based solely on submissions. We submit that the Court has not been properly moved in accordance with relevant procedure to enable it determine whether or not the Respondent is in breach of the aforesaid court order as alleged by the Claimants and to make orders accordingly.*

8.8 *The Claimants from their submissions have alleged that the Respondent is in contempt of the Court order of 19th September, 2012.*

a. *they are praying for orders that the Respondent be held to in contempt of the said Orders.*

b. *They also seek an order to compel the Respondent to continue paying their salaries.*

8.9 *Contempt of court is a grave matter. For the court to determine the issue of contempt of its orders and exercise its powers to punish the contemnor, the proper procedure must be followed and the alleged contemnor given opportunity to defend the proceedings. The procedure adopted in this case has denied the Respondent this opportunity.*

In the penultimate, they submit and argue that they are not in breach of the court order dated 19th September, 2012 in that this did not change the terms of the employment contract *inter parties* and therefore there cannot be an extension of the employment contract on expiry.

The issues for determination therefore are;

1. Is the procedure adopted in these proceedings out of tune and unknown to the law?
2. Are the respondents in breach of the orders of court of 17th September, 2012?

The 1st issue for determination is whether the court in dealing with this issue fell out of process and law. The Respondents submissions put it thus;

1. We file these submissions pursuant to your Lordship's directions issued on 20/6/2013.

I wish to reply and answer these submissions from Black Law Dictionary, 9th Edition page 1562 which defines submission as *an advocate's argument*. It further defines submissions as *the completion of series of acts by which the parties to a particular dispute place any matter of real controversy existing between them before a court with jurisdiction for a final determination. In other words, it means to end the presentation of further evidence in (a case) and tender a legal position for decision.*

This is the law dictionary's meaning and definition of the word submission.

This court was faced with an issue in the course of the proceedings. The court directed the parties to file their written submissions on the issue for its ruling in the presence of both counsel. There was no objection whatsoever. We cannot therefore be accused of adopting a procedure unknown to the law and even without the respondents consent. The respondent was present and did not object, or at all.

The definition of submissions as presented is in tandem within the requisition of court and in order. This was a presentation of legal position by counsel to facilitate a decision on the subject. The process and stage of the proceedings would have called for either oral or written submissions. This quarrel with written submissions by the respondent is therefore unsustainable. The situation did not necessarily call for a formal application.

The other issue for determination is whether the Respondent is in breach of the orders of court of 17th September, 2012. It is not. The orders facilitated a continuance of the claimants' employment and appurtenant salary and allowances. They (orders) did not go on to alter the terms and conditions of the employment contract during the pendency of the hearing of the case. The employment contracts for the claimants remained intact and untouched. This being the case, the consent orders would not have the authority to interfere with the expiry of the term of employment contract as in the present case. The orders would not be empowered to extend or in any way alter the terms of the employment contract in the absence of a further agreement by the parties.

I therefore find that the respondents are not in breach of the orders of court of 17th September, 2013 and hold as such. This eclipses the issues at hand for determination.

Dated, delivered and signed the 10th day of October 2013.

D.K.Njagi Marete

JUDGE

Appearances:

1. Mrs Arwa instructed by Arwa & Associates Advocates for the claimants/applicants.
2. Miss Sinkiyan instructed by Tobiko Njoroge & Company Advocates for the Respondents.